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OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

**DEPARTMENT OF
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ISSUED: March 3, 2005

Via E-mail and Regular Mail

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Re: CTC Communications Corp., D.T.E. 04-87

Dear Counsel:

On September 24, 2004, CTC Communications Corp. ("CTC") filed a Complaint with the Department of Telecommunications and Energy ("Department") against Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon"), requesting the following relief:

1. That the Department order Verizon to continue to provide unbundled network elements ("UNEs"), specifically, combinations of unbundled loops, switching, shared transport, multiplexing, and UNE-P for enterprise customers and customers subject to the Federal Communications Commission's ("FCC") "four-line carve-out" rule¹ (collectively, "enterprise switching") at the rates and terms under Verizon's UNE tariffs (i.e. M.D.T.E. No. 17);
2. That the Department prohibit Verizon from billing CTC for UNEs at rates not contained in M.D.T.E. No. 17;

¹ These include customers who are provisioned with four or more DS0 lines.

3. That the Department direct Verizon to credit CTC for any charges not contained in approved tariffs that have been billed to date and during the pendency of the instant Complaint; and
4. That the Department prohibit Verizon from terminating, disconnecting, or in any way impairing its service to CTC for its refusal to pay the disputed charges subject to the Complaint.

(Complaint at 1, 15). On October 8, 2004, Verizon filed its Answer, arguing that CTC is not entitled to relief as a matter of law, because CTC's access to local switching is governed solely by the terms of its interconnection agreement, which control over the terms of M.D.T.E. No. 17 (Answer at 5-6, citing Verizon New England, Inc., D.T.E. 98-57-Phase I, at 16, 21-24 (2000)).² The Department docketed this matter as D.T.E. 04-87.

After review of the pleadings, we determine that CTC is not entitled to the relief requested. CTC adopted the MCI Metro Interconnection Agreement for its Massachusetts local interconnection arrangements on July 4, 2001 (Complaint at 8 n.17). CTC's right to enterprise switching is defined within the scope of its interconnection agreement (Interconnection Agreement, Part A, § 3; Attachment III, § 7). The Department has held that

tariff provisions, whether derived from arbitration or Department investigation, will not supersede corresponding arbitrated or negotiated provisions in interconnection agreements, except in rare circumstances Tariff provisions will be applicable to interconnection agreements only where the parties to the agreement have explicitly provided in the agreement that an applicable tariff shall control the terms of the offering.

D.T.E. 98-57-Phase I, at 19; see also Mass Market Switching, D.T.E. 03-60/04-73, at 41 n.27, 71 n.42 (2004). Therefore, CTC's rights, which may have been altered as a result of the FCC's Triennial Review Order and USTA II,³ must be resolved according to the terms of the

² Verizon also argues that "applicable law" under the interconnection agreement no longer requires it to provide access to the enterprise switching UNE, and that it may charge CTC a resale equivalent rate for enterprise switching without further Department approval (Answer at 7-10). Because we dismiss on other grounds, we do not reach these arguments today.

³ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003) ("Triennial Review Order"), vacated in part by United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II"), cert. denied, Nos. 04-12, 04-15, 04-18 (Oct. 12, 2004).

interconnection agreement, not the tariff provisions of M.D.T.E. No. 17. See D.T.E. 98-57-Phase I, at 19.

In approving M.D.T.E. No. 17, and subsequent tariff revisions, the Department has never directed that those provisions trump those of existing interconnection agreements. CTC is not entitled to relief on the grounds that Verizon is providing enterprise switching to CTC on terms not contained within M.D.T.E. No. 17. Moreover, we have vacated the suspension of Verizon's proposed tariff revisions to withdraw enterprise switching from M.D.T.E. No. 17 and directed Verizon to file market-based replacement rates, if Verizon offers enterprise switching as common carriage. D.T.E. 03-60/04-73, at 71-72; see also Enterprise Switching, D.T.E. 03-59-B, at 7-9 (2004).

CTC and Verizon are both parties to the consolidated arbitrations proceeding, D.T.E. 04-33, in which the Department is arbitrating the extent to which a change of law may have affected the parties' rights under the interconnection agreement. The issue of access to the network elements in question will be resolved in that proceeding. Therefore, the Department determines that because (1) CTC is not entitled to relief based on the terms of M.D.T.E. No. 17; and (2) CTC's contractual rights are already being arbitrated in D.T.E. 04-33, the complaint by CTC against Verizon is hereby dismissed.

By Order of the Department,

/s/
Paul G. Afonso, Chairman

/s/
James Connelly, Commissioner

/s/
W. Robert Keating, Commissioner

/s/
Judith F. Judson, Commissioner

/s/
Brian Paul Golden, Commissioner

cc: Service List